Supreme Court, U.S.
FILED
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CLERK

No. 97-328

In The
Supreme Court
of the United States

October Term 1997

THE TRUTH SEEKER COMPANY, INC.; and,
LAWRENCE Y. TRUE,
Trustee of the James Hervey Johnson Charitable
Educational Trust and the Truth Seeker Trust.,

Petitioners,

v.

JOHN G. JACKSON, et al.

Respondents,

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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U.S. SUPREME COURT RULE, RULE 29.6[1] STATEMENTS

Defendant/Appellee American Atheist General Headquarters (hereinafter "AAGHQ") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee American Atheist General Headquarters has no parent companies, subsidiaries, or affiliates. Appellee American Atheist General Headquarters does not issue shares of stock to the public.

Defendant/Appellee Society of Separationists (hereinafter, "SOS") is a Maryland corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee Society of Separationists has no parent companies, subsidiaries, or affiliates. Appellee Society of Separationists does not issue shares of stock to the public.

Defendant/Appellee American Atheists, Inc. (hereinafter, "AAI") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee American Atheists, Inc. has no parent companies, subsidiaries, or affiliates. Appellee American Atheists, Inc. does not issue shares of stock to the public.

Defendant/Appellee Charles E. Stevens American Atheist Library and Archives, Inc. (hereinafter, "CESAALA") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee Charles E. Stevens American Atheist Library and Archives, Inc. has no parent companies, subsidiaries, or affiliates. Appellee Charles E. Stevens American Atheist Library and Archives, Inc. does not issue shares of stock to the public.

Defendant/Appellee American Atheist Press, Inc. (hereinafter

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1. Respondents set forth in full Rule 29.6 of the U.S. Supreme Court Rules in Appendix G, p. 37a of this Opposition's Appendix.

"AAP") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee American Atheist Press, Inc. has no parent companies, subsidiaries, or affiliates. Appellee American Atheist Press, Inc. does not issue shares of stock to the public.

Defendant/Appellee United World Atheists, Inc. is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Appellee United World Atheists, Inc. has no parent companies, subsidiaries, or affiliates. Appellee United World Atheists, Inc. does not issue shares of stock to the public.

PARTIES

Plaintiff/Appellant Lawrence Y. True, deceased[2], was Trustee of the James Hervey Johnson Charitable Educational Trust and the

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2. Mr. True passed away on May 14, 1996. As Mr. True's death occurred many months before the 9th Circuit appellate decision came out on December 31, 1996, it is unclear what living or existing client Mr. Withers now represents. Further, it is unclear why Mr. Withers did not substitute a successor during the pendency of the case in the appellate court. Nevertheless, as of this date no representative or succerssor has substituted in for Mr. True.

Furthermore, Mr. True claimed to be the president and sole owner of the Truth Seeker, Inc. corporation. However, not only has no one substituted in for Mr. True, but also no one has substituted into this case as either president and/or owner of the Truth Seeker, Inc. corporation. Therefore, Mr. Withers has been without a client since May 14, 1996, and has failed to comply with the Federal Rules of Civil Procedure, Rule 25(a), and with Rule 35 of the Rules of the Supreme Court. [Respondents set forth Fed.R.Civ.P. Rule 25 (a) in Appendix I, p. 39a, and Rule 35 of the Rules of the Supreme Court in Appendix H, p. 38a, of this Opposition's Appendix.]

Consequently, Respondents object to this petition, as Mr. Withers appears to be engaged in an adventure - a frolic - of his own, unchecked and unbidden by any client.

[Respondents' recognition of Mr. True's asserted claim should not be deemed a concession as to the truth of the claim, especially, since Mr. True was never able to provide evidence or proof before or during the trial of March 28 through April 1, 1994. See Appendix B, p. 10a]

Truth Seeker Trust, which were created under California law in San Diego, California from the estate of James Hervey Johnson, deceased, and was at all times relevant herein a citizen of the State of California.

Plaintiff/Appellant Truth Seeker Company, Inc. is a New York corporation with its principal place of business in San Diego, California.

Defendant/Appellee Madalyn E. Murray O'Hair, an individual, was at all times relevant herein a citizen of the State of Texas[3].

Defendant/Appellee John G. Jackson, deceased, an individual was at all times relevant herein a citizen of the State of Illinois.

Defendant/Appellee John W. Vinson an individual, was at all times relevant herein a citizen of the State of Texas.

Defendant/Appellee American Atheist General Headquarters (hereinafter "AAGHQ") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee Society of Separationists (hereinafter, "SOS") is a Maryland corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee American Atheists, Inc. (hereinafter, "AAI") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee Charles E. Stevens American Atheist Library and Archives, Inc. (hereinafter, "CESAALA") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee American Atheist Press, Inc. (hereinafter "AAP") is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

Defendant/Appellee United World Atheists, Inc. is a Texas corporation with its principal place of business at 7215 Cameron Road, Austin, Texas.

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3. On October 7, 1997, the United States Court of Appeals For The Ninth Circuit vacated its June 3, 1997, order staying the action against Madalyn E. O'Hair, Jon Garth Murray, and Robin Murray-O'Hair. The petition for rehearing was also denied as to these Respondents. [The Order for the Ninth Circuit Court of Appeals is set forth in Appendix C, p. 24a of this Opposition's Appendices.

The above-referenced Corporate Defendants are hereinafter referred to collectively as "Corporate Defendants."

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PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

Petitioners, Lawrence Y. True, the deceased Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust, and the Truth Seeker Company, Inc., have sought a writ of certiorari to have reviewed the opinion and order of the United States Court of Appeals for the Ninth Circuit, which affirmed the order of the United States District Court for the Southern District of California. The District Court granted both trial verdict and summary judgment against Petitioners, after it had held a concurrent non-jury trial and summary judgment hearing which had allowed Petitioners to introduce all evidence they had in support of their claims. The District Court found for Respondents because Petitioners' evidence was abjectly insufficient to prevail by either summary judgment or trial standards.

OPINIONS AND JUDGMENTS ENTERED IN THE COURTS BELOW

The December 31, 1996, opinion of the Court of Appeals, of whose judgment Petitioners seek review, which has been decertified for

publication, is set forth in Appendix A to this Opposition[4], pp. 1a-7a. The Order of the Court of Appeals denying Appellants' Petition for Rehearing is reprinted in the separate Appendix to Petitioners' Petition for Writ of Certiorari at pp. 14a-15a. The opinion of the Honorable Manuel L. Real, Judge, of the United States District Court for the Southern District of California in the case of Jackson v. Truth Seeker Company, Inc. found at 884 F. Supp. 370 (S.D. Cal. 1994), is also reprinted in Appendix B to this Opposition[5], at pp. 8a - 23a.

STATEMENT OF THE CASE

I. Pertinent Procedural History:

The two consolidated actions were scheduled for trial to begin on March 28, 1994[6]. The morning of the trial, Respondents moved to dismiss all causes of action. The District Court granted the motion to

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4. Petitioners have made such numerous errors in setting forth the contents of the December 31, 1996 Appellate Court's opinion , that Respondents have had to reprint the opinion in this Opposition's Appendix A.

5. Petitioners have also made a plethora of errors in setting forth the contents of Judge Real's November 16, 1994, opinion, such that Respondents have had to reprint the opinion in this Opposition's Appendix B.

6. Respondents had timely filed motions in limine which inter alia, requested striking the jury.

strike the jury and decided that the matters would proceed simultaneously on two tracks: First, as a non-jury trial, and second as a hearing to determine whether there were any material facts in dispute, thereby treating Respondents' motion to dismiss sua sponte as a motion for summary judgment on all claims.

From March 28 through April 1, 1994, non-jury trial was held before the Honorable District Court Judge Real. Petitioners utilized all four days to present their case; nevertheless, Petitioners failed to present sufficient evidence in support of their allegations and to support a prima facie showing as to even one cause of action.. In fact, after Petitioners completed their presentation of evidence, it was so readily apparent that Petitioners had failed to prove their allegations that Respondents chose not to waste any more of the trial judge's time or to incur further litigation expenses, and thereupon by simply rested their case before putting on any defense.

On November 23, 1994, the District Court, sitting as trial judge and as the finder of fact, concluded that Petitioners failed to establish their prima facie case, and ruled:

"Treating the evidence presented to the court either as

a motion for summary judgment determining material facts without controversy or as a trial on the merits judgment shall be for the defendants."

[Appendix B, p. 23a.]

II. Statement of Facts:

Petitioners, in their fervor to advance their position, have entirely supplanted accuracy with advocacy. Consequently, Respondents hereby object to Petitioners' imaginative rendition of facts, as almost every statement of fact alleged by Petitioners in their petition is either (1) contradicted by the findings of the trial judge, or (2) unsupported by the trial record. Since the trial judge heard all evidence and sat as fact finder in the non-jury trial, Respondents adopt the District Court's factual determinations. The District Court's factual findings are set out, hereinbelow:

FACTUAL BACKGROUND

"This matter involves two law suits and a counterclaim. These three cases essentially boil down to a controversy

between John G. Jackson and Madalyn O'Hair on one side and James Hervey Johnson on the other. The dispute concerns the promulgation of atheist ideology and the survival of Truth Seeker Company, Inc. ("TSC, Inc.") and The Truth Seeker, the publication established to spread atheist doctrine throughout the English speaking world. These matters are complicated only in the sense that parties who were, at best, observers of the Jackson-O'Hair-Johnson dispute were caught in the elaborate web of Johnson's counterclaims. A brief history of TSC, Inc. and the key players in these cases will go a long way in unraveling the confusion."

"The Truth Seeker magazine was initiated in 1873. In 1940, one Charles Smith took over operation of the The Truth Seeker and filed articles of incorporation in New York, thus Creating TSC, Inc. The articles specified perpetual life and authorized issuance of 200 shares of stock with a provision for the issuance of more."

"In the early 1960s, Smith presented O'Hair and Jackson, on separate occasions, with stock interests in TSC, Inc. because

of the work they had done for his company and the atheist movement in general. However, no evidence of stock ownership resulting from these transfers survives. O'Hair was never issued a stock certificate although there is no evidence that a stock certificate was not issued [to her] and held by Smith. Jackson claims that his stock certificates were either lost during a move or thrown away because he thought they had no pecuniary value. Furthermore, at the time she was given a stock interest, O'Hair was asked to take over the publication of The Truth Seeker, which she declined to do."

"Charles Smith died in 1964. Prior to his death, Smith moved to San Diego, California and there joined up with Johnson. After Smith's death Johnson, acting as president of TSC, Inc., continued to publish the magazine although it remains unclear as to how Johnson came into possession of the corporate structure. No evidence was presented at trial of Johnson's ownership or inheritance of TSC, Inc. In 1981, 1983 and 1984 O'Hair requested that Johnson relinquish management and control of TSC, Inc. and its publication. Johnson refused.

Meanwhile, under his stewardship, The Truth Seeker's subscribers list dwindled from 25,000-30,000 to 200-400 subscribers by 1987."

"Nineteen eighty-seven was a busy year in this saga. O'Hair felt particular urgency in taking over The Truth Seeker for the benefit of the atheist movement because she was worried about Johnson's advanced age and poor health and the drastic decline in subscriptions. Besides these concerns, O'Hair was further troubled because she had recently learned that Johnson's will left all his property in an open-ended trust to be administered by Lawrence Y. True, a non-atheist. O'Hair enlisted Stephen B. Thorne and Robin Shelley to assist Johnson in publication of the The Truth Seeker as well as to obtain evidence of wrongdoing by Johnson in the conduct of TSC, Inc. and its sister non-profit organizations, American Association for Advancement of Atheism and The National Liberal League. It paid off because Thorne observed Johnson commingling funds from these organizations with his own. He apprised O'Hair of the commingling."

"Additionally, in the summer of 1987, O'Hair regularly noticed a meeting of shareholders and other atheist "regulars" and "old-timers" interested in The Truth Seeker. A notice of the meeting was sent personally to Johnson; he did not attend. The meeting was held in Austin, Texas, the situs of O'Hair's offices and of a new corporation named Truth Seeker of Austin, Inc. ("TSA, Inc."). At this meeting O'Hair was elected to office by the persons present."

"From June 1988 to September 1989 O'Hair distributed, without charge to anyone, a series of three newsletters, appropriately titled The Truth Seeker Newsletter, detailing publicly her efforts to re-start a viable atheist publication, Johnson's activities at TSC, Inc. and the progress of the lawsuits concerning Johnson and the defendants in both cases. Moreover, O'Hair attempted to freeze TSC, Inc.'s assets pending resolution of the litigation then in progress and in contemplation of future litigation to determine corporate ownership. In her capacity as an officer of TSA, Inc., she presented a corporate resolution to the bank and post-office to

re-route TSC, Inc. mail to a post office box under Thorne's control in Escondido, California. No TSC, Inc. funds were ever withdrawn nor did any damage result to Johnson or the corporation from these actions."

"Furthermore, in early 1987 O'Hair first learned that Jackson had also received a stock interest from Smith in TSC, Inc. After O'Hair informed Jackson of Johnson's misconduct which Thorne had reported, O'Hair and Jackson decided to obtain the advice of a lawyer, John W. Vinson, who was in the employ of O'Hairs companies in Texas. They were advised by Vinson that he had researched the matter and that Jackson could file a stockholder's suit in California to require an accounting by Johnson of TSC, Inc. activities. Jackson took the attorney's advice."

[Appendix B, pp. 9a, to 12a.]

III. District Court's Rulings As To Petitioners' Failure To Prove Case:

On November 23, 1994, the District Court ruled that Petitioners

failed to prove their case. The District Court enumerated particulars in which Petitioners failed to present evidence as to material facts; the specifics are quoted here verbatim:

"1. That American Atheist G.H.Q., Inc., aka American Atheist Center, a Texas corporation; The Society of Separationists, Inc., a Maryland corporation; American Atheist, Inc., a Texas corporation; Charles E. Stevens American Atheist Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; United World Atheists, Inc., a Texas corporation are the alter egos of any of the defendants;

2. That the corporations listed in paragraph one were aware of activities of Jackson or O'Hair in bringing the Jackson case until Johnson's counterclaim was filed in 1988;

3. That any of the corporate defendants had any knowledge of TSA, Inc. activity until after the counterclaim was filed in 1988;

4. That defendants Robin Murray-O'Hair, John Garth Murray, or the corporate defendants ever authorized or ratified any attempt to take-over TSC, Inc.;

5. That any person was confused or likely to be confused as to the source of the San Diego-issued The Truth Seeker and the Austin-issued The Truth Seeker Newsletter;

6. That any act performed by any defendant was done for any fraudulent purpose;

7. That any defendant gained any profit by reason of any act performed during the relevant period encompassed by these cases;

8. That any defendant acted with any motive or ill will toward plaintiffs;

9. That the amounts incurred and paid as attorneys' fees by plaintiffs were reasonable or necessary to the prosecution of these actions; the inference is to the contrary that these fees are in fact exorbitant;

10. That they suffered any damage resulting from the

defendants' alleged conduct underlying either the Johnson or True cases."

[Appendix B, pp. 16a - 17a.]

In the November 23, 1994, ruling, the District Court further concluded that,

> "At trial, this failure of proof equates to a verdict for the defendants. If treated as the defendants' motion for summary judgment, this court is required to grant the motion. '[S]ince a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial[,] [t]he moving party is "entitled to a judgment as a matter of law."' Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)."
>
> [Appendix B, p. 17a.]

IV. Appellate Court's Rulings Affirming The District Court:

After the issues raised on appeal were fully briefed and argued,

on December 31, 1996, the Court of Appeals for the Ninth Circuit entered its ruling. The Appellate Court agreed with the District Court's conclusion "that the uncontroverted facts that [Petitioners] raise again on appeal are not helpful to [Petitioners'] case and are not indicative of material facts in existence." [Appendix A, p. 5a]

The Court of Appeals further concluded that:

> "...because the [Petitioners] presented no evidence of the reasonableness of the attorneys' fees claimed as damages, we hold that the district court properly granted summary judgment in favor of the [Respondents]. While [Petitioners] did offer evidence that attorneys' fees were incurred and paid, they point to nothing in the record supporting the reasonableness of the fees. Fed.R.Civ.P. 56. On the single occasion when [Petitioners] attempted to introduce evidence of the reasonableness of the fees, the court properly sustained the [Respondents'] objection. (The question was obviously leading.) RT Vol. II at 339. Because the district court properly granted summary judgment in

favor of the [Respondents], ..."

[Appendix A, p. 6a.]

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

Counsel Filing The Petition Does Not Have A Client To Represent, As Petitioner Lawrence Y. True Died On May 14, 1996; Therefore The Petition For Writ Of Certiorari Should Be Rejected In Its Entirety.

Mr. Lawrence Y. True brought the underlying action against Respondents as an individual, and also as the trustee and self-proclaimed sole owner/president of the The Truth Seeker, Inc. corporation[7].

Over six months before the Ninth Circuit Court of Appeals

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7. Respondents challenged Mr. True's standing to bring an action against Respondents on behalf of the The Truth Seeker corporation. Nevertheless, while not relying upon Petitioners standing for making its ruling that Petitioners failed to prove their prima facie case, the District Court also stated:

> If, as a matter of law, the lack of written evidence establishing stock ownership was fatal to Jackson's lawsuit so it must likewise be fatal to Johnson's and True's standing to claim ownership in TSC, Inc. or a proprietary interest in The Truth Seeker. [Appendix B, p. 16a]

issued its order affirming the District Court's ruling, Mr. True passed away; specifically, on May 14, 1996, Mr. Lawrence Y. True died from cancer at the age of 73[8]. Although it is nearly seventeen months after Mr. True's death, Respondents have yet to be served with a notice of party substitution for Mr. True, or for Mr. True as the trustee and alleged sole owner/president of The Truth Seeker, Inc. corporation. Consequently, it is unclear who Petitioners' counsel, Mr. Roy R. Withers, is claiming to represent for his petition for writ of certiorari. It would seem that Mr. Withers has been engaged in an adventure - a frolic - of his own, unchecked and unbidden by any client.

Therefore, as it is unclear who actually has standing to seek this Court's grant of a petition for writ of certiorari, the petition should be rejected in its entirety.

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8. Respondents have attached to this Opposition's Appendices as Appendix K, p.41a, a true and correct copy of Mr. True's death certificate from the County of San Diego.

II.

Petitioners Have Failed To Offer Any Compelling Reason Either For This Court To Review And Reverse The Lower Courts' Factual Determinations/Conclusions Of Law, Or Why This Court Should Entertain Questions Not Raised To The Appellate Court.

Petitioners have filed their petition for writ by certiorari, claiming to invoke this Court's jurisdictional powers pursuant to 28 U.S.C. §1254(1). Petitioners appear to believe that review of writ of certiorari is a matter of right, versus an exercise of the Supreme Court's judicial discretion.

1. **Issues Not Raised To Appellate Court:**

The Supreme Court has adopted a general rule that provides that the Supreme Court will not ordinarily consider issues which are neither previously raised by a party seeking review, nor considered by the United States Court of Appeals. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970). In the present petition, Petitioners seek this Court's reversal based upon three separate questions presented. However, Petitioners' second and third questions presented were not

raised before the Court of Appeals for the Ninth Circuit, nor were they considered by that court. While the Supreme Court has recognized deviations from the general rule, it has held that in only exceptional cases will the Court review a question not raised in the lower court, see Lawn v. United States, 355 U.S. 339,78 S.Ct. 311 (1958), reh den, 355 U.S. 967, 78 S.Ct. 529. Petitioners have failed to make any showing that this case is somehow exceptional. Consequently, the general rule should apply and the second and third questions presented should be disregarded and not considered by this Court.

2. **No Compelling Reason Provided To Invoke This Court's Grant Of The Petition**

Petitioners have also failed to adequately state one compelling reason that would justify this Court's review of the three questions presented, a review of the lower courts' factual findings, and reversal of the lower courts' rulings. Rule 10 of the Rules of the Supreme Court provides clear guidance as to some of the criteria this Court uses in its

determination to exercise its discretion[9]. Nevertheless, upon even a cursory examination, Petitioners' asserted questions fail to conform to any one of the reasons set forth in Rule 10 (a) through (c). Nowhere do Petitioners make a showing:

(1) that the Appellate Court has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

(2) that the Appellate Court has decided an important federal question in a way that conflicts with a decision by a state court of last resort; and/or

(3) that the Appellate Court has departed from the accepted and usual course of judicial proceedings, or sanctioned a departure by a lower court.

Finally, Rule 10 expressly states that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." While Petitioners have attempted to formulate and slant their questions

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9. Respondents have reprinted Rule 10 of the Rules of the Supreme Court in Appendix E, p. 34a.

in "error of law" vocabulary, Petitioners are essentially seeking a review of the District Court's and Court of Appeal's separate, but shared, conclusions of factual finding. Both lower courts held that Petitioners failed to introduce sufficient factual evidence to support their claims against Respondents. In fact, both lower courts determined that the evidence submitted by Petitioners in support of their allegations actually detracted from Petitioners' claims.

Petitioners simply were not entitled to damages for causes of action they could not prove. Accordingly, they have failed to adequately state any compelling reason why the Supreme Court should exercise its discretion to review this case. Consequently, Petitioners' petition for writ of certiorari should be rejected.

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III.

Petitioners' Claims Are Misguided Because The Ruling Of The Appellate Court Simply Affirmed The District Court's Holding That Petitioners' Failed To Prove A Prima Facie Case During the Trial; Therefore, Since No Material Issues Were Shown To Exist, Summary Judgment Was Indeed Appropriate.

Summary judgment is properly granted where the court finds that there are no genuine issues as to any material fact and the moving party is entitled to judgment on undisputed facts and the correct application of the law. Fed.R.Civ.P. 56(c)[10]. Rule 56(c) does not require that there be no factual dispute at all: "[b]y its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Paragon Podiatry Laboratory v. KLM Laboratories, 984 F.2d 1182, 1184-85 (Fed. Cir. 1993; see also

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10. Respondents set forth Federal Rule of Civil Procedure's Rule 56 (c) in its entirety in Appendix J, p. 40a.

Hanon v. Dataproducts Corporation, 976 F.2d 497 (9th Cir. 1992).

The mere disagreement about a material issue of fact is not in itself sufficient to preclude an award of summary judgment. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1389 (9th Cir. 1990). If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Id. Furthermore, the district courts "possess the power to enter summary judgment sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548 (1986). The only limitation is that the party against whom summary judgment is entered must have "a full and fair opportunity to develop and present facts and legal arguments in support of [its] position." Portsmouth Square v. Shareholders Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985).

Petitioners claim that the Appellate Court ruling is reversible on the basis that the Appellate Court has increased the evidentiary requirement for a summary judgment determination is devoid of subtance or merit. Petitioners would like to have the ruling reviewed as

though it were simply the result of a summary judgment hearing, without any evidentiary submissions having been considered. However, Petitioners ignore the fact that the Appellate Court affirmed the District Court's holding that Petitioners failed to submit adequate evidence of their allegations at trial. Since Petitioners had a full and fair opportunity to develop and present facts and legal arguments during the four day non-jury trial, there was no reversable error by the District Court making the factual determination that Petitioners failed to substantiate their claims. Nor was it reversable error for the District Court to conclude that no material issues of fact remained to support any claims for damages, and that summary judgment was indeed appropriate.

IV.

The Petition For Writ of Certiorari Should Be Rejected Because During The Trial Petitioners Failed To Submit Any Evidence Of the Reasonableness Of Their Damages And Now Misstate The Law Concerning Such Evidentiary Requirements.

Petitioners claim Mr. True gave testimony at trial "that

$382,683.50[11] was incurred in the defense of the malicious action brought by defendants, and subsequently paid, [this] established a prima facie showing of damages." [Petition for Writ of Certiorari, p. 17] In support of Petitioners position, they rely heavily upon the case of Stevens v. Chisholm, 179 Cal. 557, 178 P. 128 (1919). However, Petitioners have selectively quoted and misapplied the California Supreme Court's general statement regarding a prima facie showing of reasonableness. The California Supreme Court in Stevens stated, "When it does not appear that the attorneys' fees and other expenses are obviously excessive, testimony of the amounts paid will constitute a prima facie case; and it will be assumed in such case that the attorneys' fees so paid were reasonable, unless the contrary appears.[emphasis added to portion not quoted by Petitioners]" Id. at 564. With regard to attorney fees and costs, the Stevens court further stated,

> "... damage to the plaintiff therefore is the amount which

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11. Mr. True was only able to state a total figure by reading the total dollar amount from a piece of paper, which was hidden in his pocket, and taken out to respond to his attorney's questions. After the slip of paper was revealed to the trial judge, and after Mr. True was not allowed to simply parrot the amounts, Mr. True was not able to give testimony as to the exact amount of legal fees and costs incurred. Upon questioning, Mr. True was only able to testify to an amount "over $300,000." [See, Appendix D, p. 28a to 33a.]

he has been compelled to expend or incur in his defense, but he can only recover such part thereof as constitutes a necessary and reasonable charge; the latter question being one to be determined from the evidence. [emphasis added]" Id. at 564.

Petitioners never introduced any evidence during the trial which provided proof of any payment of attorney fees and/or costs; no evidence of cancelled checks, bills, or accounting records were ever offered, submitted, or testified about. In fact, Petitioners offered absolutely no evidence as to the number of hours billed, what services were actually rendered, or any breakdown as to what constituted the "over $300,000" dollar figure. Consequently, the Appellate Court expressly noted that Petitioners "point[ed] to nothing in the record supporting the reasonableness of the fees." [Appendix A, p. 6a.]

Now, in support of their claim that Petitioners attempted to submit evidence of the reasonableness of the claimed attorney fees, Petitioners have quoted an excerpt from Ms. Madalyn Murray O'Hair's

examination testimony[12]. First, it seems illogical for Petitioners to claim to have tried to show the "reasonableness" of their attorney fees by the testimony of defendant O'Hair; the question begs to be asked: "How could Ms. O'Hair, called by Petitioners as a hostile witness, testify to the reasonableness of the Petitioners' incurred attorneys' fees?"

Second, Petitioners make another fatal leap in logic. At the time Ms. O'Hair was testifying, Petitioners had not provided any evidence as to the total amount of attorney fees, or to the amount paid for their attorneys' services. Thus, the District Court made the statement,

> "No. You tell me what the attorneys' fees are and they will then answer it, yes or no, on big or little. Up till now there has been no attack on it."
>
> [RT Volume II at 190, Lines 14-15]

Nevertheless, Petitioners have hurdled to the conclusion that "[a]ny evidence from Plaintiffs, on the issue of reasonableness, would not be entertained by the District Court, as such evidence was deemed

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12. Respondents must point out that Petitioners failed to raise this evidence in support of their appeal. Now, Petitioners again try to raise new evidence and issues before this Court. Consequently, the petition should be rejected as Petitioners' new evidence simply does not rise to the level of an exception to the general rule discussed in Section II of Respondents' Reasons For Denying The Writ of Certiorari.

irrelevant until damages were challenged by the Defendants." [Petition, p. 17]

Furthermore, this conclusion ignores that fact that the District Court made its own inquiry into the reasonableness of the damages claimed to have been suffered by Petitioners. Shortly after Ms. O'Hair testified, Petitioners offered the testimony of Mr. Lawrence True.[13] In Petitioners one and only attempt to offer testimony as to the reasonableness of the attorneys' fees, the question asked was objected to, and sustained by the trial judge, as being leading. Moreover, the witness was incompetent on the subject. Instead of rephrasing the question, Petitioner's counsel abruptly halted his questioning. After the cross-examination, the Trial Judge sought specific information from Mr. True as to the nature and reasonableness of the "over $300,000" claimed as damages, yet, Mr. True was unable to provide the specific information requested and made absolutely no showing of reasonableness.

Finally, Petitioners state that,

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13. Respondents have included pertinent excerpts from Mr. Lawrence Y. True's examination in Appendix D, pp. 28a to 33a, of this Opposition's Appendix.

"Even if it were argued that the fees were obviously excessive, the argument assumes that there is an amount which is not excessive. The question and material trial issue would be what is the reasonable value for the services rendered by the attorneys in the defense of the malicious action." [Petition, p. 17]

Again, Petitioners fail to acknowledge that they had a full and fair opportunity to present their evidence during a four-day trial. Petitioners had their trial, yet no material issue as to damages was found to exist by the District Court. Further, Petitioners also fail to accept the fact that they failed to submit sufficient evidence as to any of their underlying claims even to give rise to the issue of whether the damages they incurred were reasonable. For example, Petitioners never adequately supported their claims that the action brought against them by Respondents was initiated with any sort of malice.

Thus, Petitioners' presented questions of:

(1) whether summary judgment was appropriate, even though there was no showing that damages were reasonable or necessary,

(2) whether the damages of attorneys' fees should have been determined by the trial judge without the introduction of any evidence of reasonableness at trial, and

(3) whether nominal damages could have been given by the trial judge,

have become immaterial issues. Petitioners are essentially asking this Court to review and reverse both lower courts' factual determinations and legal determination that Petitioners did not meet their burden of proof on each cause of action. Therefore, no award of damages was necessary or appropriate.

CONCLUSION

Procedurally, Petitioners' petition should be rejected because by review of the death of Lawrence Y. True, Petitioners are not properly before this Court.

Substantively, Petitioners base their petition for writ of certiorari on faulty and misguided assertions. Petitioners claim that the District Court overstepped its discretionary power: (1) by allegedly increasing the evidentiary requirements on the issue of damages during a summary

judgment; (2) by not assessing the reasonableness of attorney fees when no evidence of the reasonableness of attorney fees was introduced by Petitioners at trial; and, (3) by the District Court not awarding nominal damages to Petitioners.

First, the petition for writ of certiorari should be rejected because the Petitioners' fail to recognize that a party to suit is not entitled to damages unless the party claiming injury meets his or her burden of proof on all elements to at least one cause of action. In this case, both the District Court and the Appellate Court determined that, despite the fact that Petitioners had every opportunity to introduce evidence to support their claims during a non-jury trial, Petitioners failed to prove a prima facie case as to even one cause of action. Therefore, any issue of whether damages and/or attorney fees were reasonable, or whether the District Court should have awarded nominal damages, immediately became an immaterial issue and properly subject to dismissal pursuant to F.R.C.P. 56.

Second, the petition for writ of certiorari should be rejected because Petitioners never raised, during Petitioners' appeal to the Ninth Circuit Court of Appeals, the issues they now advance. Petitioners are

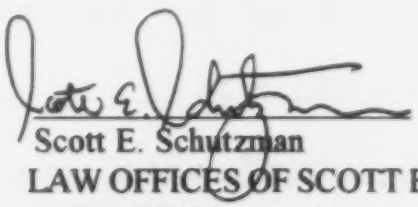
requesting review of never-before-raised questions, despite the Supreme Court's general rule of rejecting issues previously not raised.

Third, the petition for writ of certiorari should be rejected because the Ninth Circuit Opinion presents no danger of disturbance of precedent. There is simply no likelihood for any "future confusion" as argued by Petitioners, because the Appellate Court specifically stated that the disposition was not appropriate for publication and was not to be cited. [see, Appendix A, p. 3a, Fn. (*)]

Finally, the Court is asked to find Petitioners' petition frivolous under Rule 42 of the U.S. Supreme Court Rules and assess appropriate sanctions.

WHEREFORE, as no good reason appears to grant certiorari, the petition should be denied.

Respectfully submitted,



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APPENDIX A

NOT FOR PUBLICATION
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed, December 31, 1996

JOHN G. JACKSON, et al.,	)	Nos.: 95-55310
	)	95-55501
Plaintiffs,	)	
	)	D.C. No. CV 87-01441
v.	)	Lead Docket
	)	
THE TRUTH SEEKER COMPANY, INC., THE ESTATE OF JAMES HERVEY JOHNSON, et al.,	)	
	)	
Defendants,	)	
	)	
THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC., a New York corporation,	)	
	)	
Counter-Claimants Appellants,	)	
	)	
v.	)	
	)	
JOHN G. JACKSON, et al.,	)	
	)	
Counter-Defendants Appellees,	)	
	)	
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and the THE	)	D.C. No. CV 91-00494-MR

TRUTH SEEKER COMPANY, INC.,

Plaintiffs-Counter-Claimants-Appellants

v.

JOHN G. JACKSON, et al.

Defendants/Counter-Defendants-Appellees,

JOHN G. JACKSON, et al.,

Plaintiffs,

v.

THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al.,

Defendants,

THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC., a New York corporation,

Counter-Claimants Appellees,

v.

JOHN G. JACKSON, et al.,

Counter-Defendants

and

No. 95-55589

D.C. No. CV 87-1441-MR

MADALYN MURRAY O'HAIR, et al.,	)	
Defendants Counter-Defendants Appellants.	)	
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and the THE TRUTH SEEKER COMPANY, INC.,	)	D.C. No. CV 91-00494-MR
Plaintiffs-Counter-Claimants-Appellees,	)	
v.	)	
JOHN G. JACKSON, a private individual,	)	
Defendant/Counter-Defendant	)	
and	)	
MADALYN MURRAY O'HAIR, et al.,	)	
Defendants/Counter-Defendants-Appellants.	)	MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California

* This Disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Manual L. Real, District Judge, Presiding

Argued and Submitted April 9, 1996
Pasadena, California

Before: SCHROEDER and LEAVY, Circuit Judges, and TRIMBLE,** District Judge

Plaintiffs appeal the district court's denial of their request for a jury trial in their unfair competition, trademark, tradename infringement, Lanham Act, and RICO action (also known as the "*Johnson* action") and malicious prosecution action (the True action). Plaintiffs also appeal from the district court's judgment in favor of the defendants on the substantive claims because uncontroverted evidence was presented by plaintiffs as to material facts in existence. Appeals Nos. 95-55501 and 95-5310. Defendants appeal the district court decisions denying attorneys' fees and sanctions and calculating the amount of costs taxed for defendants pursuant to Rule 54(d) of the Federal Rules of Civil Procedure. Appeal No. 95-55589.

The right to a jury trial in a civil case is granted by either the United States Constitution, a state constitution, or a statute that creates a cause of action different from that of the common law. Neither party has pointed to any statutory or state constitutional right that guarantees plaintiffs a jury trial for the recovery of attorneys' fees. Therefore, the right to a jury trial in this matter is

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** The Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

grounded in the U.S. Constitution and in federal law. *Simler v. Conner*, 371 U.S. 221, 222 (1963). The Seventh Amendment of the U.S. Constitution provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...."

With respect to the district court's decision to strike the jury trial in the *Johnson* action, plaintiffs failed to prove damages in excess of twenty dollars. Although plaintiffs argue that various monies were involved that exceeded twenty dollars, this court agrees with the district court's findings that any such monies were contributions to a legal defense fund that could not be considered a part of plaintiffs' damages. This court also agrees with the lower court decision that the uncontroverted facts that plaintiffs raise again on appeal are not helpful to plaintiffs' case and are not indicative of material facts in existence.

This court, however, disagrees with the district court's decision to strike the jury trial in the malicious prosecution action because plaintiffs alleged damages in excess of twenty dollars resulting from attorneys' fees spent in the underlying suit. In *Bertero v. National General Corp.*, 118 Cal.Rptr. 184 (Cal. 1976), the California Supreme Court acknowledged that attorneys' fees incurred in defending against an underlying action could be claimed as damages in a later malicious prosecution action, stating:

> The malicious commencement of civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed

> because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. ***In recognition of the wrong done the victim of such tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees.***

Id. at 190 (citations omitted and emphasis added).

Similarly, in a case involving a claim of malicious prosecution with respect to a civil claim, the court in *Von Brimer v. Whirlpool Corp.*, 536 F. 2d 838 (9th Cir. 1976), stated that :

> The range of damages potentially recoverable in a malicious prosecution action in California is strikingly broad. Damages may be recovered for loss of time, deprivation of liberty, injury to fame, reputation, character, social or mercantile standing, mental suffering, injury to credit, and ***for sums expended in defending the unfounded lawsuit.***

Id. at 847 (citations omitted and emphasis added).

Nevertheless, because the plaintiffs presented no evidence of the reasonableness of the attorneys' fees claimed as damages, we hold that the district court properly granted summary judgment in favor of the defendants. While plaintiffs did offer evidence that attorneys' fees were incurred and paid, they point to nothing in the record supporting the reasonableness of the fees. Fed.R. Civ. P. 56. On the single occasion when plaintiffs attempted to introduce evidence of the reasonableness of the fees, the court properly sustained the defendants' objection. (The question was obviously leading.) RT Vol. II at 339.

Because the district court properly granted summary judgment in favor of the defendants, the issue of a jury trial became moot.

Finally, this court is asked to address whether the district court erred in denying defendants' requests for attorneys' fees and sanctions and miscalculated the amount of costs taxed for defendants. Defendants, however, have failed to provide a sufficient showing that the district court abused its discretion in denying an award of attorneys' fees and sanctions. Furthermore, this court sees no error in the district court's calculation of the amount of costs taxed in this matter.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Filed November 21, 1994

JOHN G. JACKSON, et al.,	) Case No.: 87-1441-K (LSP)
	) 91-0494-K (LSP)
Plaintiffs,	)
	)
vs.	) OPINION
	)
THE TRUTH SEEKER COMPANY, INC., et al.,	)
	)
Defendants,	)
	)
AND RELATED COUNTERCLAIM	)
	)
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and the THE TRUTH SEEKER COMPANY, INC.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
JOHN G. JACKSON, a private individual; et al.	)
	)
Defendants.	)

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OPINION AND ORDER

The court held a non-jury trial concurrent with a hearing to determine whether there were any material facts in dispute on defendants' Rule 12 (b) motion which was being considered as a motion for summary judgment. For the reasons stated below, the court ordered judgment in favor of the defendants.

I. FACTUAL BACKGROUND

This matter involves two law suits and a counterclaim. These three cases essentially boil down to a controversy between John G. Jackson and Madalyn O'Hair on one side and James Hervey Johnson on the other. The dispute concerns the promulgation of atheist ideology and the survival of Truth Seeker Company, Inc. ("TSC, Inc.") and The Truth Seeker, the publication established to spread atheist doctrine throughout the English speaking world. These matters are complicated only in the sense that parties who were, at best, observers of the Jackson-O'Hair-Johnson dispute were caught in the elaborate web of Johnson's counterclaims. A brief history of TSC, Inc. and the key players in these cases will go a long way in unraveling the confusion.

The Truth Seeker magazine was initiated in 1873. In 1940, one Charles Smith took over operation of the The Truth Seeker and filed articles of incorporation in New York, thus Creating TSC, Inc. The articles specified perpetual life and authorized issuance of 200 shares of stock with a provision for the issuance of more.

In the early 1960s, Smith presented O'Hair an Jackson, on separate occasions, with stock interests in TSC, Inc. because of the work they had done for his company and the atheist movement in general.* However, no evidence of stock ownership resulting from these transfers survives. O'Hair was never issued a stock certificate although there is no evidence that a stock certificate was not issued and held by Smith. Jackson claims that his stock certificates were either lost during a move or thrown away because he thought they had no pecuniary value. Furthermore, at the time she was given a stock interest, O'Hair was asked to take over the publication of The Truth Seeker, which she declined to do.

Charles Smith died in 1964. Prior to his death, Smith moved to San Diego, California and there joined up with Johnson. After Smith's death Johnson, acting as president of TSC, Inc., continued to publish the magazine although it remains unclear as to how Johnson came into possession of the corporate structure. No evidence was presented at trial of Johnson's ownership or inheritance of TSC, Inc. In 1981, 1983 and 1984 O'Hair requested that Johnson relinquish management and control of TSC, Inc. and its publication. Johnson refused. Meanwhile, under his stewardship, The Truth Seeker's

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1. Notably, Smith was grateful to O'Hair for having won a significant victory for the atheist movement in the United States Supreme Court case School District of Abington Township v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

subscribers list dwindled from 25,000-30,000 to 200-400 subscribers by 1987.

Nineteen eighty-seven was a busy year in this saga. O'Hair felt particular urgency in taking over The Truth Seeker for the benefit of the atheist movement because she was worried about Johnson's advanced age and poor health and the drastic decline in subscriptions. Besides these concerns, O'Hair was further troubled because she had recently learned that Johnson's will left all his property in an open-ended trust to be administered by Lawrence Y. True, a non-atheist. O'Hair enlisted Stephen B. Thorne and Robin Shelley to assist Johnson in publication of the The Truth Seeker as well as to obtain evidence of wrongdoing by Johnson in the conduct of TSC, Inc. and its sister non-profit organizations, American Association for Advancement of Atheism and The National Liberal League.[2] It paid off because Thorne observed Johnson commingling funds from these organizations with his own. He apprised O'Hair of the commingling.

Additionally, in the summer of 1987, O'Hair regularly noticed a meeting of shareholders and other atheist "regulars" and "old-timers" interested in The Truth Seeker. A notice of the meeting was sent personally to Johnson; he did not attend. The meeting was held in Austin, Texas, the situs of O'Hair's offices and of a new corporation named Truth Seeker of Austin, Inc. ("TSA, Inc."). At

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2. Johnson was allegedly the president of these not-for-profit corporations.

this meeting O'Hair was elected to office by the persons present.

From June 1988 to September 1989 O'Hair distributed, without charge to anyone, a series of three newsletters, appropriately titled The Truth Seeker Newsletter, detailing publicly her efforts to re-start a viable atheist publication, Johnson's activities at TSC, Inc. and the progress of the lawsuits concerning Johnson and the defendants in both cases. Moreover, O'Hair attempted to freeze TSC, Inc.'s assets pending resolution of the litigation then in progress and in contemplation of future litigation to determine corporate ownership. In her capacity as an officer of TSA, Inc., she presented a corporate resolution to the bank and post-office to re-route TSC, Inc. mail to a post office box under Thorne's control in Escondido, California. No TSC, Inc. funds were ever withdrawn nor did any damage result to Johnson or the corporation from these actions.

Furthermore, in early 1987 O'Hair first learned that Jackson had also received a stock interest from Smith in TSC, Inc. After O'Hair informed Jackson of Johnson's misconduct which Thorne had reported, O'Hair and Jackson decided to obtain the advice of a lawyer, John W. Vinson, who was in the employ of O'Hairs companies in Texas. They were advised by Vinson that he had researched the matter and that Jackson could file a stockholder's suit in California to require an accounting by Johnson of TSC, Inc. activities. Jackson took the attorney's advice.

II. PROCEDURAL HISTORY

In October 1987, Jackson, as a shareholder of TSC, Inc., instituted the first law suit against defendants TSC, Inc., James Hervey Johnson[3], and the two not-for-profit corporations, American Association for Advancement of Atheism and The National Liberal League [hereinafter "the Jackson case"]. Alleging that Johnson commingled TSC money with his own, misappropriated funds into his personal accounts and generally mismanaged the accounts and the book distribution business of TSC, Inc., Jackson sought an accounting and other relief concerning the operation of TSC, Inc.

On this underlying action, the Estate filed a counterclaim for itself and TSC, Inc. against several defendants, the most important for the purposes of this opinion being Jackson and O'Hair[4] [hereinafter "the Johnson case"]. The counterclaim was brought for (1) conversion; (2) trademark/tradename infringement; (3) conversion and infringement of common law rights; (4) violation of the Lanham Act (15 USC §1225(a)); (5) RICO (18 USC §1962(b));

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3. James Hervey Johnson was the originally named defendant. On August 6, 1988 Johnson died and his estate took his place in the law suit.

4. The other defendants are Jon Garth Murray, Robin Murray O'Hair, Arnold Via, Robin Shelley, all individuals, and American Atheist G.H.Q., Inc. aka America Atheist Center, a Texas corporation; The Society of Separationists, Inc., a Maryland corporation; American Atheist, Inc., a Texas corporation; Charles E. Stevens American Atheist Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; United World Atheists, Inc., a Texas corporation. During the pendency of the Jackson case, the counterclaimants dismissed defendants Via, Thorne and Shelly.

(6) conduct of an enterprise involving interstate commerce through a pattern of racketeering activity (18 USC 1962(c)); and (7) conspiracy to violate 18 USC 1962(b) racketeering activity to acquire/maintain interest/control of an enterprise engaged in/affecting interstate commerce.

On April 11, 1991 a second law suit was filed by True, trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust, both created by the will of Johnson [hereinafter "the True case"]. This action was brought for malicious prosecution against Jackson and O'Hair as well as a familiar cast of other defendants.[5]

Subsequently, the Jackson case fell victim to summary judgment because Jackson could not produce the stock certificates he claimed were given to him by Smith. The Johnson case and the True case were consolidated and proceeded as a jury trial. This proceeding ended in a deadlocked jury. A mistrial was declared and the matter then came before me for a new trail.

Defendants moved to have the new trial proceed as a non-jury trial. First, they argued that the evidence at the first trial established that Johnson and

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5. The defendants are John W. Vinson, attorney of record for the filing of the Jackson case ; American Atheists G.H.Q, Inc., aka American Atheist Center, a Texas corporation; The Society of Separationists, Inc., a Maryland corporation; American Atheist, Inc., a Texas corporation; Charles E. Stevens American Atheist Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; United World Atheists, Inc., a Texas corporation.

True had not suffered damages of twenty dollars or more, the threshold requirement which triggers the constitutional right to a civil trial by jury as guaranteed by the Seventh Amendment. Second, there was no federal or state statute creating a right to jury trial in an action for conversion, trademark/tradename infringement, malicious prosecution or for violations of the Lanham Act or RICO.

Ruling for the defendants, the court held that Johnson had failed to file a timely jury demand on the counterclaims or present proof of damage of twenty dollars or more in the first trial. The Johnson case was to proceed non-jury. As for the True case, the court found that the evidence showed that the plaintiffs had not suffered a minimum of twenty dollars in damages nor was there a statute providing for a jury trial in a malicious prosection action, and thus were not entitled to a civil jury trial.

On the eve of trial, defendants moved to dismiss all causes of action. Under the circumstances, the court decided that the matters proceed simultaneously on two-tracks -- as a non-jury trial and a hearing to determine whether there were any material facts in dispute on the motion to dismiss which would now be treated as a motion for summary judgment on all claims.

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III. DISCUSSION

A. Substantive Claims

If, as a matter of law, the lack of written evidence establishing stock ownership was fatal to Jackson's lawsuit so it must likewise be fatal to Johnson's and True's standing to claim ownership in TSC, Inc. or a proprietary interest in The Truth Seeker. However, the court need not rely on the issue of standing to find for the defendants in this matter because the plaintiffs simply did not establish their prima facia case. During the non-jury trial/hearing, the plaintiffs failed to present evidence as to the following material facts:

1. That American Atheist G.H.Q., Inc., aka American Atheist Center, a Texas corporation; The Society of Separationists, Inc., a Maryland corporation; American Atheist, Inc., a Texas corporation; Charles E. Stevens American Atheist Library and Archives, Inc., a Texas corporation; American Atheist Press, Inc., aka Gustav Broukal Press, a Texas corporation; United World Atheists, Inc., a Texas corporation are the alter egos of any of the defendants;

2. That the corporations listed in paragraph one were aware of activities of Jackson or O'Hair in bringing the Jackson case until Johnson's counterclaim was filed in 1988;

3. That any of the corporate defendants had any knowledge of TSA, Inc. activity until after the counterclaim was filed in 1988;

4. That defendants Robin Murray-O'Hair, John Garth Murray, or the corporate defendants ever authorized or ratified any attempt to take-over TSC, Inc.;

5. That any person was confused or likely to be confused as to the source of the San Diego-issued The Truth Seeker and the

Austin-issued The Truth Seeker Newsletter;

6. That any act performed by any defendant was done for any fraudulent purpose;

7. That any defendant gained any profit by reason of any act performed during the relevant period encompassed by these cases;

8. That any defendant acted with any motive or ill will toward plaintiffs;

9. That the amounts incurred and paid as attorneys' fees by plaintiffs were reasonable or necessary to the prosecution of these actions; the inference is to the contrary that these fees are in fact exorbitant;

10. That they suffered any damage resulting from the defendants' alleged conduct underlying either the Johnson or True cases.

At trial, this failure of proof equates to a verdict for the defendants. If treated as the defendants' motion for summary judgment, this court is required to grant the motion. "[S]ince a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial[,][t]he moving party is 'entitled to a judgment as a matter of law.'" Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Moreover, the uncontroverted facts that were presented during this proceeding do not aid the plaintiffs' cases. The facts that O'Hair had been told by Thorne of his witnessing Johnson's commingling and that O'Hair and

Jackson sought and followed the advice of counsel provide the necessary probable cause for bringing the Jackson case. These facts defeat the charge of malicious prosecution. O'Hair and TSA, Inc.'s mere re-routing of TSC, Inc.'s mail does not legally support any claim of mail or wire fraud, which are necessary as predicate acts in a RICO claim. Nor does any of the conduct amount to any illegal action by O'Hair that would give rise to RICO consideration.

Based on the forgoing, it does not matter whether the court treated these proceedings as a non-jury trial or a hearing on defendants' motion to dismiss that the court sua sponte considered as a motion for summary judgment. In either instance, the court would order, and does order, judgment for the defendants.

B. The Jury Issue

The issue on the right to a jury trial in the True case for malicious prosecution was raised by the defendants' motion in limine on the grounds that plaintiffs had neither a constitutional nor statutory right to a civil jury trial. The right to a jury trial in a civil case is conferred by the United States Constitution, by a state constitution or by a statute that creates a cause of action different from the common law. In a malicious prosecution action, there is no statutory right to a jury trial. Absent such a statute, the right to a jury trial in federal court is a matter of federal law. Simler v. Conner, 371 U.S. 221, 222, 9 L. Ed. 2d 691,

693 (1963). Therefore, if these plaintiffs can successfully assert a right to a civil jury trial, it must be grounded in the Seventh Amendment of the United States Constitution.

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...." To maintain that right the controversy must exceed twenty dollars. It is because the plaintiffs' in their first trial failed to prove twenty dollars or more in damages that the court decided to proceed without a jury on the malicious prosecution claim at the second trial.

Malicious prosecution at common law was an action for recovery of damages resulting to a person, a person's property or a person's reputation from an unsuccessful proceeding, either civil or criminal. The testimony at the first trial showed that neither Johnson nor his estate suffered damages resulting from the action filed. At common law attorneys' fees were not recoverable as an element of damages. Stewart v. Snneborn, 98 U.S. 187, 25 L. Ed 116 (1878). Since Johnson offered no evidence of cognizable common-law damage to his person, business or reputation that would meet the constitutional minimum, the case does not qualify under the Seventh Amendment for a jury trial.

As a matter of first impression and perhaps as just a curious incursion into constitutional interpretation, the twenty dollar threshold of the Seventh Amendment right to a jury trial in civil cases ought to be brought into the

imminent reality of the 21st century. The twenty dollar requirement seems lost in its applicability to today's world. A party in a federal question case may demand a jury if the claim exceeds twenty dollars. However, if that same party wants a federal jury to decide the claim in a diversity of citizenship case, perhaps one involving the same conduct, to even get in the door of a federal courthouse the claim must exceed $50,000.

Perhaps the larger issue to be considered is whether or not there is any sanction for construing otherwise clear and unequivocal language in the Constitution to accommodate changes in the historical development of the law. In this instance, is a threshold of twenty dollars part of the constitutional guarantee or is it only a measure of the importance of the matter such that it requires presentation for a jury of so-called peers? Or can this "threshold" be treated merely as an extension of fact finding without a jury under the rubric of equity? See Note, The Right to a Non-Jury Trial, 74 Harv. L. Rev. 1176, 1181 91961).

To justify construction of the Constitution in this manner, the basic question ought to be does a change in the monetary requirement of a jury trial do any violence to the fundamental purpose of a jury trial. The absurdity of requiring six or twelve citizens to sit in judgment of a controversy involving as little as $21 is obvious. Even in the world of strict constructionists vs. activists, there should be little debate that perhaps the twenty dollar threshold is not

essential to the operation of a viable jury system. the twenty dollar threshold cannot be reached in this case, however, under any interpretation of the Seventh Amendment. Therefore, pursuant to Federal Rule of Civil Procedure 39(a)(2), this court finds that these plaintiffs do not have a right to a jury trial.

There is yet another problem in this case. The plaintiffs fully participated in the proceedings. They could have refused to go forward with the non-jury trial. Instead, the plaintiffs chose to present their case in its entirety. Assuming a right to jury trial existed in this case, such conduct has been held to be a waiver of that right. See White v. McGinnis, 903 F.2d 699, 703 (9th Cir. 1990) cert. denied 498 U.S. 903 (1990); Royal American Mgrs., Inc. v. IRC Holding Corp., 885 F.2d 1011, 1018 (2d Cir. 1989); Lovelace v. Dall, 820 F.2d 223, 227-29 (7th Cir. 1987) (per curium); United States v. 1966 Beechcraft Aircraft Model King Air A90 Cream, 777 F.2d 947, 950-51 (4th Cir. 1985); Allen v. Barnes Hosp., 721 F.2d 643, 644 (8th Cir. 1983).

The opinion in White v. McGinnis is instructive. In White, the plaintiff, despite having filed a demand for jury trial, participated in the two-day bench trial. White, 903 F.2d at 703. After losing, the plaintiff complained he had not waived his right to jury trial as set forth by Federal Rule of Civil Procedure 39(a)(1), and thus was denied his constitutional rights. Id. The plaintiff's claim was really an effort to get a second bite at the apple; the court of appeals clearly saw the attempt for what it was.

The Ninth Circuit stated,

> A party's vigorous participation in a bench trial, without so much as a mention of a jury, cannot be presumed the result of mere inadvertence, but can only be ascribed to knowledgeable relinquishment of the prior jury demand. This is especially so where, as here, "the [objecting] party was 'on notice that the trial court was planning to adjudicate the dispositive issues of fact.'"... "[C]ourt judgments should have meaning and effect instead of being a futile exercise that one of the parties will be able to overturn no matter what the result." The appellant chose to argue his case fully before the district judge; it is not unjust to hold him to that commitment.

Id. (citations omitted).

In the True case, the plaintiffs vigorously advocated the matter, from lengthy opening statement to post trial submission of proposed findings of fact and conclusions of law. The record reflects that the plaintiffs were fully apprised that this matter was being heard without a jury, that the proceeding was both a non-jury trial and a hearing on a motion for summary judgment, and the dispositive issues of fact were to be determined by the presiding judge. They could have filed a writ of mandamus or sought an interlocutory appeal to halt the proceedings. But for an objection in order to "make the record," the plaintiffs' conduct clearly indicated they acquiesced to the manner in which the case was to proceed. Therefore, even if the plaintiffs had a right to a jury trial, they have waived that right by their conduct. The estate of James Hervey Johnson had its full day in court.

IV. CONCLUSION

Treating the evidence presented to the court either as a motion for summary judgment determining material facts without controversy or as a trial on the merits judgment shall be for the defendants. Judgment shall be entered accordingly.

Dated: November 16, 1994.

/s/ MANUAL L. REAL
Manual L. Real
UNITED STATES DISTRICT JUDGE

APPENDIX C

NOT FOR PUBLICATION
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed. October 7, 1997

JOHN G. JACKSON, et al.,	)	Nos.: 95-55310
	)	95-55501
Plaintiffs,	)	
	)	D.C. No. CV 87-01441
v.	)	Lead Docket
	)	
THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al.,	)	
	)	
Defendants,	)	
	)	
THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC , a New York corporation,	)	
	)	
Counter-Claimants Appellants,	)	
	)	
v	)	
	)	
JOHN G. JACKSON, et al.,	)	
	)	
Counter-Defendants Appellees,	)	
	)	
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and the THE	)	D.C. No. CV 91-00494-MR

TRUTH SEEKER COMPANY, INC.,

Plaintiffs-Counter-Claimants-Appellants

v.

JOHN G. JACKSON, et al.

Defendants/Counter-Defendants-Appellees,

JOHN G. JACKSON, et al.,

Plaintiffs,

v.

THE TRUTH SEEKER COMPANY, INC.; THE ESTATE OF JAMES HERVEY JOHNSON, et al.,

Defendants.

THE ESTATE OF JAMES HERVEY JOHNSON, and THE TRUTH CO., INC., a New York corporation,

Counter-Claimants Appellees,

v.

JOHN G. JACKSON, et al.,

Counter-Defendants

and

No. 95-55589

D.C. No. CV 87-1441-MR

MADALYN MURRAY O'HAIR, et al.,	)	
Defendants Counter-Defendants Appellants.	)	
LAWRENCE TRUE, Trustee of the James Hervey Johnson Charitable Educational Trust and the Truth Seeker Trust; and the THE TRUTH SEEKER COMPANY, INC.,	)	D.C. No. CV 91-00494-MR
Plaintiffs-Counter-Claimants-Appellees,	)	
v.	)	
JOHN G. JACKSON, a private individual,	)	
Defendant/Counter-Defendant	)	
and	)	
MADALYN MURRAY O'HAIR, et al.,	)	
Defendants/Counter-Defendants-Appellants.	)	ORDER

Before: SCHROEDER and LEAVY, Circuit Judges, and TRIMBLE*, District Judge

* The Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

In light of the bankruptcy court order filed August 19, 1997, this court's order filed june 3, 1997, staying the action against Madalyn E. O'Hair, Jon Garth Murray, and Robin Murray-O'Hair is vacated.

The petition for rehearing is denied. The mandate is to issue forthwith.

APPENDIX D

PERTINENT EXCERPT FROM REPORTER'S TRANSCRIPT, PAGES 338 THROUGH 343, OF LAWRENCE Y. TRUE'S TESTIMONY:

DEPUTY CLERK: PLEASE STATE YOUR NAME FOR THE RECORD.

THE WITNESS: LAWRENCE Y. TRUE, T-R-U-E.

EXAMINATION

BY MR. WITHERS,

Q. MR. TRUE, YOU ARE THE TRUSTEE OF THE JOHNSON CHARITABLE EDUCATION TRUST AND THE TRUTH SEEKER TRUST; IS THAT CORRECT?

A. I AM.

...

Q. AND YOU HAVE HAD OCCASION TO INCUR COSTS AND FEES RELATIVE TO THE LITIGATION THAT HAS BEEN MAINTAINED BY YOU ON BEHALF OF MR. JOHNSON SINCE HIS DEATH; IS THAT TRUE?

A. YES.

Q. IS IT TRUE THAT THE AMOUNTS CLAIMED FOR THE DEFENSE OF THE INITIAL ACTION WAS $382,683.50?

A. YES, IT IS.

Q. IS IT TRUE THAT YOU ARE CLAIMING $535,690.21 ON COUNTERCLAIM?

A. THAT IS CORRECT.

Q. AND IS IT TRUE THAT THE TOTAL AMOUNT YOU CLAIM AS DAMAGES IN THIS ACTION IS $918,392.94?

MR. BOONE: OBJECTION. LEADING

THE COURT: THE OBJECTION IS SUSTAINED.

TO BEGIN WITH, THAT IS NOT A FACT. YOU HAVE ALREADY SET OUT WHAT THE CLAIMS ARE FOR EACH ACTION.

BY MR. WITHERS:

Q. AND, MR. TRUE, YOU HAVE HAD THE OPPORTUNITY TO REVIEW THE REDACTED BILLINGS IN THAT MATTER AND THE FIGURES WE HAVE QUOTED ARE ACCURATE?

A. THEY ARE; AND I HAVE REVIEWED THE BILLS, YES.

Q. AND YOU HAVE HAD EXPERIENCE IN REVIEWING ATTORNEYS' BILLS IN THE PAST; IS THAT CORRECT?

A. I HAVE

Q. AND YOU CONSIDER THOSE SUMS REASONABLE; IS THAT TRUE?

MR. BOONE: OBJECTION, YOUR HONOR.

THE COURT: OBJECTION SUSTAINED.

MR. WITHERS: I HAVE NO FURTHER QUESTIONS, YOU HONOR.

THE COURT: CROSS-EXAMINATION

MR. SCHUTZMAN: I HAVE A COUPLE, YOUR HONOR.

EXAMINATION

BY MR. SCHUTZMAN:

Q. MR. TRUE, I NOTICED YOU PUT A PIECE OF PAPER IN YOUR POCKET RIGHT AFTER MR. WITHERS ASKED YOU QUESTIONS.

...

THE COURT: HE TOOK IT OUT OF HIS POCKET. THE OBJECTION IS OVERRULED.

BY MR. SCHUTZMAN:

Q. MR. TRUE, HOW MUCH MONEY IN DAMAGES DID YOU SAY WAS INCURRED IN THIS PROSECUTION ACTION?

A. PARDON ME?

Q. HOW MUCH MONEY IN DAMAGES DID YOU INCUR IN THE INITIAL JACKSON VERSUS TRUTH SEEKER ACTION?

A. IT'S OVER 300,00.

Q. AND WHAT DO YOU BASE THAT NUMBER ON?

A. WELL, THAT'S THE AMOUNT OF BILLS THAT WERE

INCURRED.

Q. WHAT WERE THOSE BILLS FOR?

A. FOR THE DEFENSE OF THE ORIGINAL ACTION.

Q. ASIDE FROM THE DEFENSE, ASIDE FROM THE ATTORNEYS' FEES AND COSTS IN THE DEFENSE OF THE ORIGINAL ACTION, DID YOU HAVE ANY OTHER DAMAGES THAT WOULD COMPRISE THAT NUMBER?

A. NO.

Q. AND, MR. TRUE, AS FAR AS THE COUNTERCLAIM, DO YOU RECALL THE NUMBER OR THE AMOUNT OF DAMAGES YOU ARE ASKING FOR IN THE COUNTERCLAIM?

A. IT IS ABOUT -- OVER 500,000.

...

THE COURT: MR. TRUE, HOW MUCH PER HOUR WERE YOU PAYING COUNSEL?

THE WITNESS: 150 PER HOUR.

THE COURT: FOR HOW MANY HOURS?

THE WITNESS: I CERTAINLY DON'T REMEMBER HOW MANY HOURS. WHAT DO YOU MEAN, SIR?

THE COURT: WELL, HOW MANY HOURS DID YOU PAY HIM FOR?

THE WITNESS: YOU MEAN OVER THE TOTAL COURSE OF THE --

THE COURT: OF JACKSON VERSUS TRUTH SEEKER.

THE WITNESS: I DON'T KNOW.

THE COURT: HOW MUCH WERE YOU PAYING FOR THE ATTORNEYS' FEES THAT YOU ARE CLAIMING IN THIS ACTION?

THE WITNESS: 150 AN HOUR.

THE COURT: AND HOW MANY HOURS ARE YOU CLAIMING THAT YOU PAID FOR?

THE WITNESS: I DO NOT KNOW. I CAN CERTAINLY FIND OUT. BUT I DON'T CARRY --

THE COURT: I AM ASKING WHAT DO YOU KNOW.

YOU ARE TESTIFYING AS TO YOUR DAMAGE AS A RESULT OF CERTAIN ACTIONS AND I WANT TO KNOW HOW MUCH YOU PAID AND FOR HOW MANY HOURS. THAT IS THE WAY LAWYERS GET PAID.

THE WITNESS: IS THAT THE QUESTION?

THE COURT: YES.

HOW MANY HOURS?

THE WITNESS: I DON'T HAVE THE SLIGHTEST IDEA.

THE COURT: ALL RIGHT

MR. WITHERS: YOUR HONOR, IF I MAY SUBMIT SOMETHING TO THE COURT?

THE COURT: NO. HE HAS TESTIFIED, UNLESS YOU ARE GOING TO BECOME A WITNESS.

APPENDIX E

U.S. SUPREME COURT RULES:

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or ha so far departed from the accepted and usual court of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with

relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

APPENDIX F

U.S. SUPREME COURT RULES:

RULE 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

APPENDIX G

U.S. SUPREME COURT RULES:

Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing.

(6) Every document, except a joint appendix or amicus curiae brief, filed by or on behalf of one or more corporations shall list all parent companies and nonwholly owned subsidiaries of each of the corporate filers. If there is no parent or subsidiary company to be listed, a notation to this effect shall be included in the document. If a list has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier list appeared in an application for an extension of time or for a stay), and only amendments to the list to make it current need be included in the document being filed.

APPENDIX H

U.S. SUPREME COURT RULES:

RULE 35. Death, Substitution, and Revivor; Public Officers

1. If a party dies after filing a petition for a writ of certiorari to this Court, or after filing a notice of appeal, the authorized representative of the deceased party may appear and, on motion, be substituted as a party. If the representative does not voluntarily become a party, any other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and if a petitioner or appellant, is entitled to proceed as in any other case or nonappearance by a respondent or appellee. If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.

2. Whenever a case cannot be revived in the court whose judgment is sought to be reviewed, because the deceased party's authorized representative is not subject to that court's jurisdiction, proceedings will be conducted as this Court may direct.

APPENDIX I

Federal Rule of Civil Procedure:

Rule 25. Substitution of Parties:

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

APPENDIX J

Federal Rule of Civil Procedure:

Rule 56. Summary Judgment:

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. the adverse party prior to the day of hearing may serve opposing affidavits. the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages.

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF SAN DIEGO

CERTIFICATE OF DEATH

STATE OF CALIFORNIA

STATE FILE NUMBER 396537007376

1. NAME OF DECEDENT—FIRST (GIVEN)		2. MIDDLE		3. LAST (FAMILY)			
LAWRENCE		YORK		TRUE			
4. DATE OF BIRTH MM/DD/CCYY	5. AGE YRS.	IF UNDER 1 YEAR: MONTHS	DAYS	IF UNDER 24 HOURS: HOURS	MINUTES	6. SEX	7. DATE OF DEATH MM/DD/CCYY	8. HOUR
02/02/1923	73					M	05/14/1996	1150
9. STATE OF BIRTH	10. SOCIAL SECURITY NO.	11. MILITARY SERVICE		12. MARITAL STATUS	13. EDUCATION—YEARS COMPLETED		
NY	104-12-1681	19 TO 19		MARRIED	20		
14. RACE	15. HISPANIC—SPECIFY			16. USUAL EMPLOYER			
CAUCASIAN	YES X NO			SECURITY PACIFIC NATIONAL BANK			
17. OCCUPATION	18. KIND OF BUSINESS/INDUSTRY			19. YEARS IN OCCUPATION			
TRUST OFFICER, VICE PRESIDENT	BANKING			27			
20. RESIDENCE—STREET AND NUMBER OR LOCATION							
5309 CANTERBURY DRIVE							
21. CITY	22. COUNTY	23. ZIP CODE	24. YRS IN COUNTY	25. STATE OR FOREIGN COUNTRY			
SAN DIEGO	SAN DIEGO	92116	35	CA			
26. NAME, RELATIONSHIP	27. MAILING ADDRESS (STREET AND NUMBER OR RURAL ROUTE NUMBER, CITY OR TOWN, STATE, ZIP)						
ROSE MARIE N. TRUE, WIFE	5309 CANTERBURY DRIVE, SAN DIEGO, CA 92116						
28. NAME OF SURVIVING SPOUSE—FIRST	28. MIDDLE	28. LAST (BIRTH NAME)					
ROSE MARIE	JOY	NELSON					
31. NAME OF FATHER	32. MIDDLE	33. LAST	34. BIRTH STATE				
RANSOM	BADGER	TRUE, III	NY				
35. NAME OF MOTHER—FIRST	36. MIDDLE	37. LAST (BIRTH NAME)	38. BIRTH STATE				
EMILY	-	BATTERSON	NY				
39. DATE MM/DD/CCYY	40. PLACE OF FINAL DISPOSITION						
05/16/1996	FORT ROSECRANS NATIONAL CEMETERY, CABRILLO MONUMENT DRIVE, SAN DIEGO, CA 92106						
41. TYPE OF DISPOSITION	42. SIGNATURE OF EMBALMER	42a. LICENSE NO.					
CR/BU	NOT EMBALMED	-					
44. NAME OF FUNERAL DIRECTOR	45. LICENSE NO.	46. SIGNATURE OF LOCAL REGISTRAR	47. DATE MM/DD/CCYY				
MERKLEY-MITCHELL MORTUARY	FD-119	OIC	05/15/1996 TLM				
101. PLACE OF DEATH	102. IF HOSPITAL, SPECIFY CODE	103. FACILITY (IF NOT HOSPITAL)	104. COUNTY				
SAN DIEGO HOSPICE ACUTE CARE CNTR	IP ER/OP DOA	OTHER	SAN DIEGO				
105. STREET ADDRESS—STREET AND NUMBER OR LOCATION			106. CITY				
4311 THIRD AVENUE			SAN DIEGO				
107. DEATH WAS CAUSED BY: ENTER ONLY ONE CAUSE PER LINE FOR A, B, C, AND D.			INTERVAL BETWEEN ONSET AND DEATH	108. DEATH REPORTED TO CORONER			
IMMEDIATE CAUSE (a) METASTATIC PROSTATE CANCER			14 YRS	YES X NO			
DUE TO (b)				109. AUTOPSY PERFORMED? X YES NO			
DUE TO (c)				110. AUTOPSY PERFORMED? YES X NO			
DUE TO (d)				111. USED IN DETERMINING CAUSE? YES NO			
112. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO CAUSE GIVEN IN 107							
NONE							
113. WAS OPERATION PERFORMED FOR ANY CONDITIONS IN ITEM 107 OR 112? IF YES, LIST TYPE OF OPERATION AND DATE.							
ORCHIECTOMY, --/--/1989							
114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED.	115. SIGNATURE AND TITLE OF CERTIFIER	116. LICENSE NO.	117. DATE SIGNED MM/DD/CCYY				
		C40088	05/15/1996				
PERSON ATTENDED DECEDENT MM/DD/CCYY	PERSON LAST SEEN ALIVE MM/DD/CCYY	118. TYPE ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS, ZIP					
05/09/1996	05/14/1996	CHARLES LEWIS,M.D.; 4311 THIRD AVENUE, SAN DIEGO, CA 92103					
I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED.	119. MANNER OF DEATH	120. INJURY AT WORK	121. INJURY DATE MM/DD/CCYY	122. HOUR	123. PLACE OF INJURY		
	NATURAL ACCIDENT SUICIDE HOMICIDE PENDING INVESTIGATION COULD NOT BE DETERMINED	YES NO					
	124. DESCRIBE HOW INJURY OCCURRED (ENTER WORDS "DURING WORK" IF INJURY)						
	125. LOCATION—STREET AND NUMBER OR LOCATION AND CITY AND ZIP CODE						
126. SIGNATURE OF CORONER OR DEPUTY CORONER	127. DATE MM/DD/CCYY	128. TYPED NAME, TITLE OF CORONER OR DEPUTY CORONER					
STATE REGISTRAR	A	B	C	D	E	F	G	H	FAX AUTH. # 9607378	CENSUS TRACT

A0063905

County of San Diego - Department of Health Services - 3851 Rosecrans Street. This is to certify that, if bearing the OFFICIAL SEAL OF THE STATE OF CALIFORNIA, the OFFICIAL SEAL OF SAN DIEGO COUNTY AND THEIR DEPARTMENT OF HEALTH SERVICES EMBOSSED SEAL, this is a true copy of the ORIGINAL DOCUMENT FILED. Required fee paid.

DATE ISSUED: August 28, 1997

ROBERT K. ROSS, M.D.
REGISTRAR OF VITAL RECORDS
County of San Diego

This copy not valid unless prepared on engraved border displaying seal and signature of Registrar.

ANY ALTERATION OR ERASURE VOIDS THIS CERTIFICATE

BEST AVAILABLE COPY